NG KING CHONG & ANOR v. OOI KIM GEIK & ORS

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
VERNON ONG LAM KIAT JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: B-02(NCC)(A)-1532-08-2017]
15 OCTOBER 2018

COMPANY LAW: *Winding-up – Petition – Setting aside – Application for – Whether shareholders included as parties to winding-up petition – Whether cause papers served to shareholders – Whether shareholders aware of winding-up of company – Whether leave from winding-up court ought to be obtained to set aside winding-up petition – Whether failure to obtain leave abuse of court process – Whether applicants seeking to set aside winding-up petition should proceed with action in winding-up court or institute fresh suit – Whether there was breach of natural justice – Companies (Winding-up) Rules 1972, rr. 24 & 25 – Companies Act 1965, ss. 218(1)(f) & (i)*

CIVIL PROCEDURE: *Jurisdiction – High Court – Application to set aside winding-up petition order made by High Court – Jurisdiction of High Court to set aside order of another High Court – Whether order made null and void on grounds of breach of natural justice, illegality or lack of jurisdiction – Whether High Court functus officio – Whether High Court seized with jurisdiction to set aside order of another High Court*

The second respondent ('the company') was established by the first respondent's late husband, one Ng Kin Yong ('NKY'). NKY had his siblings, the appellants and another brother ('the Ng siblings'), involved in the business and their relationship was *quasi*-partnership. When NKY passed away, his shares were transferred to the first respondent and she was appointed as the director of the company. Since the first respondent was never involved in the operations and management, she relied on the Ng siblings to manage the company. The first respondent's role was limited to checking and monitoring the finances of the company. The company's business began to stagnate and the Ng siblings later submitted their incentive claims to the company and the first respondent for her approval. Refusing to approve the incentive claims, the first respondent argued that (i) the Ng siblings' claims were not supported by any agreement or resolution; (ii) no such incentive scheme existed; and (iii) incentive claims made by the Ng siblings were without basis, wrong and inconsistent with the arrangement allowed by NKY. The relationship between the first respondent and the Ng siblings deteriorated and there was loss of confidence and trust between them. The operations and management of the company was severely affected. When a meeting to resolve the dispute between the parties failed to achieve

any settlement, the first respondent applied, at the High Court ('the winding-up court'), to wind-up the company. The company was wound up and the appellants applied (i) to set aside the winding-up order *via* an originating summons ('OS'); and (ii) for an injunction restraining the third respondent, the liquidator of the company from carrying out the liquidation of the company until the disposal of the OS ('encl. 5'). The High Court dismissed the appellants' OS and encl. 5 on the grounds that the appellants (i) failed to obtain leave from the winding-up court before filing the OS and encl. 5 and this amounted to an abuse of process; (ii) should have proceeded with their claims or action in the winding-up court instead of instituting a fresh suit; and (iii) were aware of the winding-up petition filed against the company but did not take part in the proceedings. Hence, the present appeal. In support of their appeal, the appellants submitted that there was a breach of natural justice as the first respondent, as the petitioner, failed (i) to include the appellants in the winding-up petition; and (ii) to serve the cause papers on the appellants as the members/contributories of the company. The respondents argued that, *inter alia*, (i) one High Court could not set aside a final order regularly obtained from another High Court of concurrent jurisdiction; (ii) any application to set aside the winding-up order ought to have been made at the winding-up court; and (iii) there had been no breach of natural justice as there was no requirement under the Companies Act 2016 or the Companies (Winding-up) Rules 1972 ('the Rules') for the petition to be served on the shareholders of the company.

Held (allowing appeal and setting aside order of High Court; matter remitted to High Court to be re-heard with appellants added as respondents)

Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) The petition was filed pursuant to ss. 218(1)(f) and (i) of the Companies Act 1965 ('CA 1965'). Section 218(1)(f) of the CA 1965 states that the court may order the winding-up of a company 'if the directors have acted in the affairs of the company in their own interests rather than the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members'. Section 218(1)(i) of the CA 1965 states that winding-up may be ordered if 'the court is of opinion that it is just and equitable that the company be wound up'. The grounds relied upon by the first respondent, to establish just and equitable ground, have much in common with an oppression petition presented under s. 181 of the CA 1965. An oppression action could be brought against any director, shareholder or third parties. In such an action, the alleged oppressors, as well as the company, would be named as the respondents to the action. It is only fair and just that those upon whom serious allegations have been made are given the opportunity to respond to the petition by filing affidavits in-reply. (paras 20, 24, 27 & 28)

(2) The petition filed by the first respondent ought to have named the appellants as respondents and ought to have been served on them in the normal way. It was no answer to say the appellants were duly served with the advertisement, as required under r. 24 of the Rules. The provision is more to provide a general notice to all creditors of the company where any action is filed to wind-up the company with the intention to invite support or opposition to the petition. Such advertisement would not disclose the allegations made against the appellants. They would, in the end, remain clueless as to the allegations made against them. Service of the petition on the company, as required by r. 25 of the Rules, also offers no assistance as the company is separate from the shareholders. It does not follow that once a company is served, the shareholders would be deemed to have knowledge. (paras 28-30)

(3) As a general rule, an aggrieved party who is dissatisfied with a final order of a court of unlimited jurisdiction must appeal to a higher court. The exception to this rule is that, where an order is null and void on the grounds of breach of natural justice, illegality or lack of jurisdiction, such court will have the power, under its inherent jurisdiction, to set aside its own order. Where an order is a nullity, it could be successfully challenged in collateral proceedings. (para 35)

(4) The High Court had the jurisdiction to set aside its own order, which was made in breach of natural justice, and to order the matter to be re-heard with the appellants being allowed to be heard on the petition. The argument of *functus officio* had no traction as only arguments of one side had been heard *albeit* in breach of the rules of natural justice. The High Court itself was in error when failing to order the petition to be served on the parties against whom serious allegation of wrongdoing were made and who would also be most affected by the order for winding-up of the company. In the circumstances, it would be unjust to disregard such error and disallow the appellants from being heard on merits. It was also pointless to argue that the application to set aside the winding-up order should have been made in the winding-up court and not by way of a fresh action. Furthermore, the argument that the appeal was fatal as the appellants failed to first obtain leave of the winding-up court was a non-starter. (paras 36-38)

***Bahasa Malaysia** Headnotes*

Responden kedua ('syarikat') ditubuhkan oleh mendiang suami responden pertama, Ng Kin Yong ('NKY'). NKY menyertakan saudara-saudara kandungnya, iaitu perayu-perayu dan seorang lagi saudara kandung lelaki ('Ng bersaudara'), dalam perniagaannya dan hubungan mereka separa rakan kongsi. Apabila NKY meninggal dunia, saham-sahamnya dipindah milik kepada responden pertama yang juga dilantik menjadi pengarah syarikat.

Oleh kerana responden pertama tidak pernah terlibat dalam operasi dan pengurusan syarikat, dia bergantung pada Ng bersaudara untuk menguruskan syarikat. Peranan responden pertama setakat memeriksa dan menyelia kewangan syarikat. Perniagaan syarikat mula tidak berkembang dan Ng bersaudara mengemukakan tuntutan insentif mereka kepada syarikat dan responden untuk diluluskan. Enggan meluluskan tuntutan insentif mereka, responden menghujahkan (i) tuntutan Ng bersaudara tidak disokong apa-apa perjanjian atau resolusi; (ii) skim insentif sedemikian tidak wujud; dan (iii) tuntutan insentif Ng bersaudara tidak berasas, salah dan tidak selari dengan aturan yang dibenarkan oleh NKY. Hubungan antara responden pertama dengan Ng bersaudara semakin buruk dan tiada lagi keyakinan dan kepercayaan antara mereka. Operasi dan pengurusan syarikat terjejas teruk. Apabila satu mesyuarat untuk menyelesaikan pertikaian antara pihak-pihak menemui jalan buntu, responden pertama memohon, di Mahkamah Tinggi ('mahkamah penggulungan'), untuk menggulung syarikat. Syarikat digulung dan perayu-perayu membuat permohonan (i) mengetepikan perintah penggulungan melalui satu saman pemula ('SP'); dan (ii) injunksi menghalang responden ketiga, iaitu pelikuidasi syarikat, menjalankan pembubaran syarikat hingga SP dilupuskan ('lampiran 5'). Mahkamah Tinggi menolak SP perayu dan lampiran 5 atas alasan perayu-perayu (i) gagal memperoleh kebenaran mahkamah penggulungan sebelum memfailkan SP dan lampiran 5 dan ini terjumlah sebagai penyalahgunaan proses; (ii) sepatutnya meneruskan dengan tuntutan-tuntutan atau tindakan mereka dalam mahkamah penggulungan dan bukan memulakan guaman baharu; dan (iii) sedar tentang petisyen penggulungan yang difailkan terhadap syarikat tetapi tidak mengambil bahagian dalam prosiding. Maka timbul rayuan ini. Menyokong rayuan mereka, perayu-perayu menghujahkan terdapat pencabulan keadilan asasi kerana responden pertama, sebagai pempetisyen, gagal (i) menyertakan perayu-perayu dalam petisyen penggulungan; dan (ii) menyampaikan kertas-kertas kausa kepada perayu-perayu sebagai ahli-ahli/pencarum-pencarum syarikat. Responden-responden menghujahkan, antara lain, (i) satu Mahkamah Tinggi tidak boleh mengetepikan perintah muktamad, yang diperoleh secara teratur daripada satu lagi Mahkamah Tinggi yang berbidang kuasa serentak; (ii) apa-apa permohonan mengetepikan perintah penggulungan sepatutnya dibuat di mahkamah penggulungan; dan (iii) tiada pencabulan keadilan asasi kerana tiada keperluan bawah Akta Syarikat 2016 atau Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah') agar petisyen diserahkan kepada pemegang-pemegang saham syarikat.

Diputuskan (membenarkan rayuan dan mengetepikan perintah Mahkamah Tinggi; perkara dikembalikan ke Mahkamah Tinggi untuk pendengaran semula dengan perayu-perayu ditambah sebagai responden-responden)

Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Petisyen tersebut difailkan bawah ss. 218(1)(f) dan (i) Akta Syarikat 1965 ('AS 1965'). Seksyen 218(1)(f) AS 1965 memperuntukkan mahkamah boleh memerintahkan penggulungan sebuah syarikat 'jika pengarah-pengarah bertindak dalam hal-hal ehwal syarikat dalam kepentingan mereka dan bukan kepentingan-kepentingan ahli-ahli keseluruhannya, atau dalam apa-apa cara jua yang kelihatan tidak adil atau tidak saksama terhadap ahli-ahli lain'. Seksyen 218(1)(i) AS 1965 memperuntukkan perintah penggulungan boleh diperintahkan jika 'mahkamah berpendapat adalah adil dan berekuiti agar syarikat digulung'. Alasan-alasan yang menjadi sandaran responden pertama, untuk membuktikan alasan adil dan berekuiti, ada banyak persamaan dengan petisyen penindasan yang dikemukakan bawah s. 181 AS 1965. Satu tindakan penindasan boleh dikemukakan terhadap mana-mana pengarah, pemegang saham atau pihak-pihak ketiga. Dalam tindakan sedemikian, orang-orang yang didakwa menindas, dan juga syarikat, akan dinamakan sebagai responden-responden dalam tindakan tersebut. Adil dan saksama jika orang-orang yang dilemparkan dengan dakwaan-dakwaan serius diberi peluang memberi respon terhadap petisyen dengan memfailkan afidavit-afidavit balasan.

(2) Petisyen yang difailkan oleh responden pertama sewajarnya menamakan perayu-perayu sebagai responden-responden dan petisyen tersebut sepatutnya diserahkan kepada mereka dengan cara normal. Perayu-perayu tidak boleh dikatakan disampaikan iklan secara wajar, seperti yang dikehendaki bawah k. 24 Kaedah-Kaedah. Peruntukan ini lebih pada memperuntukkan notis am kepada semua pemiutang-pemiutang syarikat iaitu apa-apa tindakan difailkan untuk menggulung syarikat dengan niat meminta sokongan atau bantahan terhadap petisyen. Iklan sedemikian akan mendedahkan dakwaan-dakwaan yang dibuat terhadap perayu-perayu. Mereka akhirnya tidak tahu langsung tentang dakwaan-dakwaan yang dibuat terhadap mereka. Penyampaian petisyen syarikat, seperti yang dikehendaki k. 25 Kaedah-Kaedah, tidak membantu kerana syarikat berasingan daripada pemegang-pemegang saham. Ini tidak bermaksud apabila penyerahan dibuat pada syarikat, pemegang-pemegang saham akan dikatakan mempunyai pengetahuan.

(3) Sebagai peraturan am, pihak terkilan yang tidak berpuas hati dengan perintah muktamad mahkamah yang berbidang kuasa tidak terbatas mesti merayu ke mahkamah lebih tinggi. Pengecualian terhadap peraturan ini ialah, jika perintah tersebut tidak sah dan terbatal atas alasan pencabulan keadilan asasi, ketaksahan atau ketiadaan bidang kuasa, mahkamah tersebut mempunyai kuasa, bawah bidang kuasa inherennya, untuk mengetepikan perintahnya sendiri. Apabila satu perintah terbatal, perintah tersebut boleh dicabar dengan jayanya dalam prosiding kolateral.

(4) Mahkamah Tinggi mempunyai bidang kuasa mengetepikan perintahnya sendiri, yang dibuat mencabuli keadilan asasi, dan memerintahkan hal perkara tersebut didengar semula dengan perayu-perayu dibenarkan didengar berkenaan petisyen. Hujahan *functus officio* tidak mencengkam kerana hanya hujahan sebelah pihak yang didengar walaupun mencabuli keadilan asasi. Mahkamah Tinggi sendiri terkhilaf apabila gagal memerintahkan agar petisyen disampaikan kepada pihak-pihak yang terhadapnya dakwaan-dakwaan dibuat dan juga terjejas dengan perintah penggulungan syarikat. Dalam hal keadaan ini, tidak adil untuk mengabaikan kekhilafan dan tidak membenarkan perayu-perayu didengar berdasarkan merit. Sia-sia juga untuk menghujahkan permohonan mengetepikan perintah penggulungan sepatutnya dibuat di mahkamah penggulungan dan bukan melalui tindakan baharu. Tambahan lagi, hujahan bahawa rayuan terjejas teruk kerana perayu-perayu gagal memperoleh kebenaran mahkamah terlebih dahulu tidak boleh diterima.

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Chiew Sze Sun & Anor v. Cast Iron Products Sdn Bhd & Ors [1994] 1 CLJ 157 HC ***(refd)***

Dato' Ting Check Sii v. Marine Utama Sdn Bhd & Anor [2013] 1 LNS 1351 HC ***(refd)***

Ebrahimi v. Westbourne Galleries Ltd [1972] 2 All ER 492 ***(refd)***

Edmund Charles Liebenberg v. ICB-Griffin Manufacturing Sdn Bhd & Ors [2005] 3 CLJ 613 HC ***(refd)***

EU Finance Bhd v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***

Grafton Isaacs v. Emery Robertson [1985] AC 97 ***(refd)***

Hock Hua Bank v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Jet-Tech Materials Sdn Bhd & Anor v. Yushiro Chemical Industry Co Ltd & Ors and Another Appeal [2013] 2 CLJ 277 FC ***(refd)***

Lee Tain Tshung v. Hong Leong Finance Bhd [2000] 4 CLJ 15 CA ***(refd)***

Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor [1996] 2 CLJ 586 FC ***(refd)***

O'Neill v. Philips [1999] 2 BCLC 1 ***(refd)***

Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor [2010] 6 CLJ 721 FC ***(refd)***

Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank (M) Bhd & Ors (Interveners) [2000] 3 CLJ 16 CA ***(refd)***
Sinarlim Sdn Bhd v. Waja Destinasi (M) Sdn Bhd [2012] 3 CLJ 678 CA ***(refd)***
Varusay Mohamed Shaik Abdul Rahman v. SVK Patchee Brothers (Malaysia) Sdn Bhd [2002] 3 CLJ 741 CA ***(refd)***

Legislation referred to:
Companies Act 1965 (since repealed), ss. 181, 181A, 181B, 181C, 181D, 181E, 218(1)(f), (i)
Companies Act 2016, ss. 346, 347, 348, 349, 350, 471
Companies (Winding-up) Rules 1972, rr. 24, 25

For the appellants - KF Wong & YF Chan; M/s KF Wong & Lee
For the 1st respondent - Goh Keng Tat & Alexavier Lee; M/s Goh Keng Tat & Co
For the 2nd & 3rd respondents - Michael Chow & Nicholas Poon; M/s Michael Chow

[Editor's note: Appeal from High Court, Shah Alam; Originating Summons No: BA-24NCC-29-04-2017 (overruled).]

Reported by Najib Tamby

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] This appeal emanated from the decision by the Shah Alam High Court delivered on 14 July 2017. The learned judge had dismissed the appellants' originating summons to, *inter alia*, set aside a winding-up order and to declare the liquidation of the company Nation Park Sdn Bhd ("the company") to be null and void.

[2] The learned judge had also, at the same hearing, dismissed the appellants' application in encl. 5 in which an injunction was sought against the liquidator of the company, the third respondent here, from carrying out the liquidation of the company until the disposal of the originating summons.

[3] Aggrieved with the decision, the appellants filed the instant appeal. After hearing the parties and taking into consideration the written submissions, we unanimously allowed the appeal and set aside the order of the High Court. Our reasons for doing so now follow and will constitute the judgment of the court.

Background Facts

[4] On 4 June 1993, the company was established by the first respondent's late husband, one Ng Kin Yong. The business activity of the company included nursery plantation, landscaping and maintenance of landscape gardens. The late Ng Kin Yong had his siblings involved in the business, namely, the first and second appellants and another brother named Ng King Siong.

[5] Each sibling was entrusted with different responsibilities in that they handled different departments and projects of the company. The relationship of the late Ng Kin Yong and his siblings in the company was essentially a "*quasi*-partnership". The late Ng Kin Yong, as the founder and majority shareholder of the company, was at all times the decision-maker of the company. He also managed the day-to-day operations of the company and held the position of director and project manager of the company.

[6] On 16 October 2015, the late Ng Kin Yong was diagnosed with terminal cancer. He passed away on 29 March 2016. Before the late Ng Kin Yong passed away, the shareholding of the company was held by the parties as follows:

Shareholder	Unit Shares	Percentage
(a) Ng Kin Yong	313,875	77.50%
(b) Ng Kim Pin	30,375	7.50%
(c) Ng King Chong	60,750	15.00%

[7] The first respondent, being the wife (now widow) of the late Ng Kin Yong, was appointed as a director of the company on 28 March 2016 at the request of her late husband in order to maintain the company as family business. After the demise of the late Ng Kin Yong, all of his shares were transmitted to the first respondent.

[8] Despite the transfer of the shares, the first respondent was never involved in the operation and management of the company. She relied on the siblings of her late husband to manage the company. The first respondent's role was limited to checking and monitoring the finance of the company which included being a joint signatory with the second appellant in approving the company's cheques.

[9] Shortly after the demise of the late Ng Kin Yong, the company's business began to stagnate. No new tender projects were coming in. The company was surviving mainly on the balance works of the previous projects and some maintenance projects.

[10] In or around the months of July and August 2016, both the first and second appellants and Ng King Siong submitted their incentive claims to the company. The same were given to the first respondent for approval. The incentive claims by them were set out as follows:

(a) The first appellant was claiming the sum of RM333,829.98 from the years of 2009 until 2016;

(b) The second appellant was claiming the sum of RM100,006.88 from the years of 2013 up to 2016;

(c) Ng King Siong was claiming the sum of RM1,005,501.58 from the years of 2008 until 2016.

[11] The first respondent claimed she was shocked by these claims as they were not supported by any agreement or resolution between the directors and shareholders to endorse such an incentive scheme. After checking the company's accounting record, the first respondent claimed that no such incentive scheme existed. The first respondent took the position that the purported incentive claims made by the siblings were without basis, wrong and inconsistent with the arrangement allowed by the late Ng Kin Yong. As such, the first respondent refused to approve the purported incentive claims.

[12] With the first respondent's refusal to approve the incentive claims, the relationship between them deteriorated. The result was a loss of confidence and trust between the first respondent and the siblings of the late husband. The operation and management of the company was severely affected. A meeting to resolve the dispute between the parties in the presence of their solicitors was held on 26 October 2016 but failed to achieve any settlement.

[13] The first respondent then resorted to the court to wind up the company. The first respondent filed a petition for winding up the company on 14 December 2016 and the company was duly wound up on 12 April 2017. The appellants then filed the instant originating summons to set aside the said winding-up order.

At the High Court

[14] At the High Court, as alluded to at the outset, the originating summons and the application in encl. 5 were dismissed. The grounds for doing so are set out in the judgment of the learned judge and can be summarised as follows:

(a) The appellants' failure to obtain leave from the winding-up court before filing the originating summons and encl. 5 amounted to an abuse of process;

(b) The appellants should have proceeded with their claims or action in the winding-up court and not by instituting a fresh suit as the appellants have done; and

(c) Based on the affidavits filed, the appellants were aware of the winding-up petition filed against the second respondent but did not take part in that proceedings.

The Instant Appeal

[15] Before us, the decision of the High Court was assailed by the appellants on a number of grounds. However, we considered that the only ground which merited consideration, and the only ground which had any chance of success, was the ground of breach of rules of natural justice based on the principle as set out by the Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, now commonly known as the *Badiaddin* principle.

A **[16]** In essence, the complaint of the appellants was that the first respondent, as the petitioner, had failed to include the appellants as parties in the winding-up petition. It was also asserted that the first respondent as petitioner had failed to serve the cause papers on the appellants as members/ contributories of the company.

B **[17]** The first respondent argued in turn that the filing of a fresh action by the appellants amounted to an abuse of the court process. Citing the authority of *Sinarlim Sdn Bhd v. Waja Destinasi (M) Sdn Bhd* [2012] 3 CLJ 678, it was contended that the proper course would have been to file an appeal to a higher court if they were not satisfied with the order granted by the court.
C Relying on the case of *Hock Hua Bank v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143, it was further argued that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction.

[18] It was also reasoned by all the respondents that the appeal should fail
D as the appellants had failed to obtain leave of the winding-up court. Any application to set aside the winding-up order ought to have been made in the winding-up court. It was further maintained that there had been no breach of natural justice as there is no requirement under the Companies Act 2016 ("CA 2016") or the Companies (Winding-up) Rules 1972 for the petition to
E be served on the shareholders of the company.

[19] Arising out of these contentions, and in determining whether there had been a breach of natural justice, it is necessary, at the outset, to consider whether the appellants are right to assert that they ought to have been made parties to the petition and whether they ought to have been served with the
F cause papers.

[20] In this respect, it is significant that the petition was filed pursuant to s. 218(1)(f) and s. 218(1)(i) of the Companies Act 1965 ("CA 1965"). Section 218(1)(f) states that the court may order the winding up of a company if "the directors have acted in the affairs of the company in their own interests rather
G than the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members". Section 218(1)(i) states that winding up may be ordered if "the court is of opinion that it is just and equitable that the company be wound up".

H **[21]** Now, the winding up of a company on the just and equitable ground is one of the remedies available to a shareholder, as opposed to a creditor of the company, in the event of a shareholders' dispute or where there is some form of wrongdoing by the directors. The court's jurisdiction is usually invoked where the company is a *quasi*-partnership, as in the present case, but
I can also apply to other circumstances as case laws have shown. Common

examples of when this jurisdiction has been invoked is where there is a deadlock in management (see *Dato' Ting Check Sii v. Marine Utama Sdn Bhd & Anor* [2013] 1 LNS 1351; [2013] 9 MLJ 527) or where there is a breakdown in mutual trust and confidence among the shareholders (see *Varusay Mohamed Shaik Abdul Rahman v. SVK Patchee Bros (Malaysia) Sdn Bhd* [2002] 3 CLJ 741; [2002] 3 MLJ 674). A B

[22] Other remedies available to a shareholder are in cases of oppression where the court can also order the company to be wound up under s. 346 of the CA 2016. Sometimes, a share buy-out order is also made to bring an end to the oppressive conduct. Yet another recourse available to a shareholder is the statutory derivative action provided in ss. 347 to 350 of CA 2016 which provisions are similar to the old s. 181A to s. 181E of CA 1965. With the new CA 2016, however, the common law derivative action, it would appear, is no longer available to a shareholder. C

[23] However, it is trite that unlike the just and equitable ground for winding up as well as the oppression action, the derivative action is instituted on behalf of the company for a cause of action which the company has against a wrongdoer. So it is quite different in that any remedy obtained is for the benefit of the company. Apart from the shareholders, creditors could also petition for the winding up of the company based on the company's inability to pay its debts. D E

[24] In our assessment, it is evident that the grounds relied upon in the instant case, to establish the just and equitable ground, have much in common to an oppression petition presented under the old s. 181 of CA 1965 (now replaced by s. 346 of the CA 2016). In order to establish her case, the first respondent had raised serious allegation against the appellants in that they had acted against the interests of the company and were only concerned with their own benefits. F

[25] Now, in an oppression action, similar allegations can sometimes be raised successfully, for example, where directors exercise their powers for an ulterior purpose (see *Edmund Charles Liebenberg v. ICB-Griffin Manufacturing Sdn Bhd & Ors* [2005] 3 CLJ 613; [2005] 5 MLJ 259 or where there is mismanagement of a company's financial affairs (see *Chiew Sze Sun & Anor v. Cast Iron Products Sdn Bhd & Ors* [1994] 1 CLJ 157). G

[26] The common factor in each type of action is the concept of unfairness as determined by the Federal Court in *Jet-Tech Materials Sdn Bhd & Anor v. Yushiro Chemical Industry Co Ltd & Ors and Another Appeal* [2013] 2 CLJ 277; [2013] 2 MLJ 297 which decision followed the principles as set out earlier in *Ebrahimi v. Westbourne Galleries Ltd* [1972] 2 All ER 492, *O'Neill v. Philips* [1999] 2 BCLC 1 and *Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor* [2010] 6 CLJ 721. H I

[27] We also note with interest that an oppression action can be brought against any director or shareholder or even third parties. In such an action, the alleged oppressors as well as the company will be named as respondents to the action. Affidavits by each party will invariably be filed to determine the truth of the allegations.

[28] In the event, it appears incongruous to us the assertion that in a winding-up petition under the just and equitable ground, which we consider to be similar in many ways to an oppression action, there is no requirement to name as respondents the parties who are alleged to have acted against the interests of the company. In our view, it is only fair and just that those upon whom serious allegations have been made are given the opportunity to respond to the petition by filing affidavits in reply.

[29] We also think that it is no answer to say that the appellants would have been duly served with the advertisement as required under r. 24 of the Companies (Winding-up) Rules 1972. That provision, as we understand it, is more to provide a general notice to all creditors of the company where any action is filed to wind up the company with the intention to invite support or opposition to the petition. Under the said r. 24, the petition shall be advertised in Form 4 of the Companies (Winding-up) Rules 1972. Such advertisement, as can be seen from a perusal of Form 4, will not disclose the allegations made against the appellants. They will, in the end, remain clueless as to the allegations against them.

[30] Service of the petition on the company as required by r. 25 of the Companies (Winding-up) Rules 1972 also offers no assistance as the company is separate from the shareholders. It does not follow that once a company is served, the shareholders will be deemed to have knowledge. Their interests may not match as is evident from the factual matrix of the instant case. It is therefore our judgment that in the interests of justice, in addition to fulfilling the requirement under the said r. 24, the petition filed by the first respondent ought to have named the appellants as respondents and the petition ought to have been served on them in the normal way.

[31] Since it is beyond dispute that the appellants were not named as respondents and there was no proper service on them, should the petition then be set aside as being null and void for breach of natural justice? The jurisprudence in this regard, in our view, has been settled by the *Badiaddin* principle. The Federal Court there, through the judgment of Mohd Azmi FCJ, set out the law as follows (*supra* at p. 92 (CLJ); p. 409 (MLJ)):

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one exception to this rule (which was not in issue and therefore not discussed

in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '… where a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make."

[32] And His Lordship continued his pronouncement (at p. 93 (CLJ); p. 409 (MLJ)):

For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[33] In this connection as well, the Federal Court had earlier observed, through the judgment of Abdoolcader J (as he then was), in *EU Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37 as follows (p 39):

The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent.

[34] In similar vein, the Federal Court in *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586, through the judgment of Edgar Joseph Jr FCJ, stated (at p 593):

> The rule that the Court has no power under any application in the action to alter or vary a judgment after it has been entered or an order after it has been drawn up, except in so far is necessary, to correct errors in expressing the intention of the Court, is subject to certain **exceptions**, one of which is that an order which is a **nullity** owing to failure to comply with an essential provision such as service of process, can be set aside by the Court which made the order in the exercise of its inherent jurisdiction (see *Craig v. Kanseen* [1943] 1 All ER 108 at 113 CA applied in *United Malayan Banking Corpn Bhd v. Syarikat Perumahan Lunas Sdn Bhd* [1988] 1 MLJ 546). If, therefore, Counsel for the chargors were correct in his contention that the *ex parte* orders were null and void – a point to which we shall be coming to shortly – then the Judge was wrong in applying the principle of *functus officio* to the circumstances of the case before him. (emphasis added)

[35] The principles gained from the case authorities can therefore be expressed as follows. As a general rule, an aggrieved party who is dissatisfied with a final order of a court of unlimited jurisdiction must appeal to a higher court. The exception to this rule is that where an order is null and void on the grounds of breach of natural justice, illegality or lack of jurisdiction, such court will have the power under its inherent jurisdiction to set aside its own order. Where an order is a nullity, it can be successfully challenged in collateral proceedings.

[36] Reverting now to the instant case, it is our view that the High Court had the jurisdiction to set aside its own order made in breach of natural justice and to order the matter to be re-heard with the appellants being allowed to be heard on the petition. We also agree that the argument of *functus officio* had no traction as only arguments of one side had been heard *albeit* in breach of the rules of natural justice. In a sense, the High Court itself was in error when failing to order the petition to be served on the parties against whom serious allegations of wrongdoing were made and who would also be most affected by the order for winding up of the company. In the circumstances, it would be unjust to disregard such error and disallow the appellants from being heard on the merits.

[37] It is also pointless to argue that the application to set aside the order should have been made in the winding-up court and not by a fresh action. It is settled law, as we had earlier accepted, that any person affected by an order obtained in breach of natural justice is entitled to have it set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside such orders. In short, an order made in breach of the rules of natural justice was a nullity and could be challenged in collateral proceedings (see *Grafton Isaacs v. Emery Robertson* [1985] AC 97; *Lee Tain*

Tshung v. Hong Leong Finance Bhd [2000] 4 CLJ 15; [2000] 3 MLJ 364 and *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank (M) Bhd & Ors (Interveners)* [2000] 3 CLJ 16; [2000] 3 MLJ 201).

[38] For the same reasons that were canvassed in the foregoing, the argument that the appeal was fatal as the appellants had failed to first obtain leave of the winding-up court under s. 471 of CA 2016 is a nonstarter. Additionally, no leave is required as the action filed by the appellants was not to obtain any remedy for or against the company but to declare that the winding up of the company itself was null and void.

The Result

[39] In the circumstances, and for the reasons provided, we were persuaded that the decision of the learned judge was plainly wrong and cannot be upheld. The appeal was therefore allowed and the order of the High Court was set aside with the consequential order that the matter be remitted to the High Court to be reheard with the appellants added as respondents. The first respondent was ordered to pay costs of RM15,000 as costs here and below subject to allocator fees. Deposit to be refunded.